IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1090/84

BETWEEN DOMINION BUDGET RENT A CAR (1984) LIMITED
a duly incorporated company having its registered office at Wellington, Rental Car Operator

Applicant

AND AUCKLAND REGIONAL AUTHORITY
a corporate constituted under the Auckland Regional Authority Act 1963

First Respondent

AND CHRISTCHURCH CITY COUNCIL
a corporation constituted under the Municipal Corporations Act 1954.

Second Respondent

AND MUTUAL RENTAL CARS (AUCKLAND) LIMITED
a duly incorporated company, vehicle rental operator

Third Respondent

AND MUTUAL RENTAL CARS LIMITED
a duly incorporated company, rental vehicle operator

Fourth Respondent

AND TASMAN RENTAL CARS LTD
a duly incorporated company, vehicle rental operator

Fifth Respondent

Hearing: 6,7,8 November 1984

Counsel: Gault, Q.C. and Mr Stuart for Applicant
Mr Field and Mrs Burnett for 1st Respondent
Mr Palmer and Mr Weston for 2nd Respondent
Atkinson, Q.C. and Mr Steven for 3rd and 4th Respondents
Mr E. Wylie and Mr L.E. Wylie for 5th Respondent

Judgment: ~~November 1984~~
4 DEC 1984

JUDGMENT OF PRICHARD, J.

This is an application under the Judicature Amendment Act, 1972 for review of decisions made by two airport authorities in relation to the granting of licences for rental car companies to occupy booths in the International Airports at Auckland and Christchurch.

The First Respondent (the "A.R.A.") is the local authority authorised under the Airport Authorities Act, 1966 to manage the Auckland International Airport. The Second Respondent (the "C.C.C.) has the same function in respect of the Christchurch International Airport.

The Applicant ("Budget") has applied to both the A.R.A. and the C.C.C. for licences to operate its rental car business from booths at the Auckland and Christchurch International Airports. Budget is a company which was incorporated in 1983. It is managed by an Australian company and has links with a large network of rental car companies operating throughout America and Australasia.

Both airport authorities have declined to consider Budget's application, each authority maintaining that existing contractual obligations to the Third, Fourth and Fifth Respondents effectively preclude the authority

from granting a similar licence or concession to Budget.

The relief claimed by the Applicant is as follows:-

A. An order directing the ARA and the CCC to consider the submissions and representations of Budget concerning the renewal of existing licences (including the terms of such renewal), the grant of additional licences and the terms upon which and manner in which licences will be granted in the future and giving such directions as to the manner of such consideration as the Court thinks fit.

B. A declaration that the ARA and the CCC are not precluded by the terms of the licences between them and Avis Auckland, Avis and Hertz or by the conditions of tender or otherwise from granting additional licences at Auckland and Christchurch International Airports for the operation of rental car businesses.

C. An order prohibiting the Respondents or any of them from entering into any renewal or replacement of licences granted to Avis Auckland, Avis and Hertz to operate their rental vehicle businesses at Auckland and Christchurch International Airports or from agreeing to the terms of any such renewal or replacement of licences or from referring any

matters in dispute between them concerning such renewal to arbitration or otherwise from doing any acts or making any decisions which might determine the question of renewal of such licences or the grant of replacement licences until the question of the grant of additional licences for operating rental vehicle businesses at the Auckland and Christchurch International Airports or the manner and terms upon which and to whom any such additional licences might be granted has been considered and determined (after review by the Court if sought by any party).

D. A declaration that the ARA and the CCC are entitled to change the premises presently used by Avis Auckland, Avis and Hertz and or other licensees within the terminal buildings for the purpose of providing premises for additional rental vehicle operators.

Mutual Rental Cars (Auckland Airport) Limited is a subsidiary of Mutual Rental Cars Limited. By arrangement with overseas interests, both companies use the name "Avis" in connection with their rental car business. For convenience I will refer to the Third Respondent as "Avis Auckland" and to the Fourth Respondent as "Avis".

In a similar way Tasman Rental Cars Limited uses the name "Hertz": I will refer to the Fifth Respondent as "Hertz".

The situation now is that in both Auckland and Christchurch there are current licences in favour of the Avis companies and Hertz. All these licences will expire on 31 March 1985 but both the Avis companies and Hertz are entitled, according to the terms of their licences, to renewals for one further term - in Auckland a further term of 3 years and in Christchurch a further term of 5 years. The Avis companies and Hertz wish to exercise their rights of renewal. They claim (and the airport authorities agree with them) that the airport authorities are contractually obliged to renew the current licences and to refuse to grant licences to any other rental car operators while the renewed terms are effective.

In the case of the Auckland International Airport, the A.R.A. resolved, on 30 March 1982, to grant licences to Avis Auckland and to Hertz for a period of three years commencing 1 April 1982 with right of renewal for one further term of 3 years. Formal Deeds were executed under seal by the A.R.A. and the licensees. In both Deeds it was provided that the licensee's right of renewal should be exercisable on the licensee giving notice of its desire to take a renewal not less than six

months prior to the expiry of the original term. Both Avis Auckland and Hertz have given notice accordingly.

In the case of the Christchurch International Airport, in 1980, the C.C.C. granted licences to Avis and Hertz to operate from the Airport for a term of 5 years from 1 April 1980 with right of renewal for one further term of 5 years on giving notice six months prior to the expiration of the original term. Both Avis and Hertz have given the appropriate notice.

On 14 September 1984, Messrs Webster, Malcolm and Kilpatrick, solicitors acting for the Applicant, wrote to the Manager of the A.R.A. asking that Budget be granted a concession to operate from the Auckland International Airport with effect from 1 April 1985 and seeking an assurance that the Hertz and Avis licences will not be renewed until Budget's application and supporting submissions have been considered by the authority. The letter of 14 September 1984 refers in some detail to the grounds of Budget's claim to be granted a licence. I need not set out those grounds at this point as the arguments advanced in the letter of 14 September 1984 are essentially those now advanced in support of the present application. The A.R.A's response to Messrs Webster, Malcolm & Kilpatrick's letter was a letter from the authority's solicitor Mr Field to the effect that Mr Field could not recommend

the A.R.A. to give the requested assurance as it "would affect the rights of existing concessionaires".

On the same date - 14 September 1984 - Messrs Webster, Malcolm & Kilpatrick wrote in similar terms to the Manager of the Christchurch Airport Authority. The response was that while the issues raised were receiving consideration, the authority would not complete new lease arrangements with Avis and Hertz.

The stance taken by the two airport authorities is dictated by the belief, shared by both authorities, that not only are they bound to grant renewals of the current licences, but also that they are contractually bound, on granting the renewed terms, to preserve the existing arrangement whereby there are no more than two rental car concessions at each airport. There is nothing to that effect in the express terms of the current licences. But the authorities have been advised that such a term is implicit in the current licences or, alternatively, that there is a subsisting contract or a collateral undertaking to that effect entered into at the time when the licences were granted.

In addition, both authorities say that they are not able to alter the physical siting of the existing Hertz and Avis booths in order to accommodate Budget; but this is secondary to the main issue. I will not refer to this

again as it is my view that the question whether each of the authorities is able to find space in its airport for a desk for Budget's use is not germaine to the present enquiry and is a matter which each authority will have to take into account if and when it comes to consider the merits of granting an additional licence to Budget.

It is the Applicant's contention that the authorities are not under a contractual obligation to restrict the number of licences at each airport to two - either because the contractual arrangements entered into in 1980 (Christchurch) and 1982 (Auckland) are invalid or if they are valid, because there is neither an implied term in the licences nor a subsisting contract or collateral undertaking that the number of licences will be so restricted.

On 28 September 1984, Budget applied ex parte under s.8(1) of the Judicature Amendment Act, 1972 for interim orders prohibiting both authorities from renewing the existing licences until the further order of the Court. On the ex parte application, an interim order was made to remain in force until 4 October 1984, on which date it was directed that there be a hearing on notice of the interlocutory application. The result of the hearing on 4 October 1984 was that an order was made, on terms acceptable to the parties, to the effect that the two airport authorities be prohibited from renewing the

existing licences or making any decisions which might determine the question of renewal of such licences until the substantive application has been considered and decided by this Court.

There are two threshold questions, firstly as to whether the decisions of the two airport authorities not to entertain Budget's request for an aiport licence is the exercise of or the refusal to exercise a statutory power of decision as defined in s.3 of the Judicature Amendment Act, 1972 and, secondly, as to whether Budget has the locus standi to entitle it to seek a review of the decision.

Although the locus standi issue is a threshold question in the sense that unless it has standing the Applicant's case must fail in limine, I think consideration of this matter must postponed until the lines of battle have been further identified. This was the view of the House of Lords when the whole question of locus standi was reviewed in Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd (1982) A.C. 617.

As to whether the decisions under attack are in exercise of a statutory power of decision, that term is defined by s.3 of the Act as follows:-

> "Statutory power of decision" means a power or right conferred by or under any Act, or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate, to make a decision deciding or prescribing or affecting -
>
> (a) The rights, powers, privileges, immunities, duties, or liabilities of any person; or
>
> (b) The eligibility of any person to receive, or to continue to receive, a benefit or licence, whether he is legally entitled to it or not."

The decision of an airport authority to grant or refuse to grant an airport concession to a rental car operator must, in normal circumstances, be reviewable as an exercise of a statutory power of decision. If authority is needed for that proposition it is to be found in Webster v. Auckland Harbour Board (1983) N.Z.L.R. 646. The principle, clearly stated in the joint judgment of Cooke and Jefferies JJ., is that a public authority charged with the duty of managing property in the public interest and so invested with powers incidental to its managerial function does not have the same unfettered discretion in entering into contracts in the exercise of those powers as does a private person in the management of his own affairs. The Court can review decisions to exercise or to refuse to exercise such powers because they are conferred on public authorities only so that they can be used for the public good.

It is my view that, prima facie, the decision by the authorities to grant airport concessions to Hertz and Avis and to refuse a concession to Budget is a reviewable decision. This accords with the view taken by Casey, J. in Jim Harris Ltd v. Minister of Energy (1980) 2 N.Z.L.R. 294, 297. I say "prima facie" because the most contentious issue in this case is the question whether the authorities have, in fact, any discretion as to the course they will take.

As I understand the argument advanced by Mr Wylie on behalf of the Fifth Respondent (and adopted by all Respondents), the Respondents do not dispute that the initial grants of the current licences in favour of Hertz and Avis were made in pursuance of the exercise of a statutory power of decision. But the Respondents say that the stated intention of the authorities to renew the Hertz and Avis licences - and, in consequence, to refuse to entertain Budget's application for similar concessions - is on a different footing. It is the Respondents' case that the airport authorities now have no power of decision: that the authorities validly exercised their power to grant exclusive licences to Hertz and Avis in 1980 and 1982: that the inability of the airport authorities to grant airport concessions to Budget derives from contractual obligations then undertaken, and that the stated intention of the authorities not to consider Budget's application is not in exercise of a statutory

power but simply a statement that the authorities intend to fulfil pre-existing contractual obligations.

In A.B.C. Containerline v. N.Z. Wool Board (1980) 1 N.Z.L.R. 372, Davison, C.J. held that the Wool Board was bound by the terms of a contract validly entered into with the New Zealand European Shipping Association and, being precluded by those terms from allowing A.B.C. Containerline or any other shippers to participate in the carriage of wool and sheepskins from New Zealand to Europe, was not exercising a power of decision when it rejected an offer by A.B.C. Containerline to participate in the trade. Davison, C.J. put it this way:-

> "What has happened here is the Board has validly exercised its power to enter into the freight rates agreement. It has made a contract with the Association. Its inability to allow the applicant into the trade arises not from exercise of a statutory power which has already been exercised in making the contract; it arises because of the contractual obligation of the Board to limit the trade to Association members."

I am of the view that the principle applied in A.B.C. Containerline v. New Zealand Wool Board is fully applicable to the present case. But this pre-supposes:-

(a) That the existing contractual arrangements with Hertz and Avis are in fact binding on the airport authorities, and;

(b) That the terms of the contracts are such that the authorities are thereby constrained to restrict the number of concessions granted at each airport to not more than two.

Budget contends that neither of these conditions is satisfied.

I will deal first with the Applicant's contention that the current contracts between the airport authorities and the licensees are invalid, assuming at this stage that each of the contracts imports an undertaking not to grant airport concessions to more than two rental car operators at each airport during the currency of the licences, including any renewals of those licences.

The Applicant attacks the validity of the existing contractual arrangements on two fronts:-

(a) Under public law, on the basis that the decisions made in 1980 and 1982 to restrict the grant of airport concessions to Hertz and Avis were in breach of obligations cast upon the authorities by public law and so were ultra vires, unlawful, and invalid.

(b) Under statute, on the ground that the licences were obtained by collusive tendering in contravention of the Commerce Act, 1976.

At this point I think I am able to address the question of locus standi. This issue was specifically raised by Mr Wylie, whose comprehensive submissions were adopted by all the Respondents. The whole subject of locus standi was considered by the House of Lords in I.R.C. v. National Frederation of Self-Employed and Small Businesses Ltd. This was the first occasion when the topic was considered

by the House following the adoption, in 1977, of a rule of procedure corresponding to the Judicature Amendment Act, 1972. (R.S.C. Ord.53). (Later on this was given statutory force under s.31 of the Supreme Court Act, 1981). The opinions expressed in the House of Lords exhibit a degree of divergence as to the tests by which locus standi is to be determined. But it is clear from all the opinions that the present day approach is to have regard in each case to all the matters of fact and law embraced by the application and to accord standing to the Applicant on a liberal, if not generous, basis once it appears that a power of decision has been exercised, that the challenge to the validity of the exercise is founded on a principle of public law, that the Applicant is affected by or has a reasonable concern with the subject matter of the decision and that there is an appropriate remedy available within the ambit of the review procedure.

As I see it, this case is unusual in that it calls for a consideration of the Applicant's locus standi on two inter-related levels where differing criteria may apply. First, there is the question whether the Applicant has standing to apply for review of the refusals to consider the merits of its requests for airport concessions - on the assumption that the airport authorities are now effectively able to exercise a power of decision in this area. Then there is the further question whether the Applicant has standing to seek a review of the decisions

made by the airport authorities in 1980 and 1982 to grant Hertz and Avis exclusive licences. If those contracts stand, and if they mean what the Respondents say they mean, then, for practical purposes, they deprive the airport authorities of the power to now grant concessions to Budget - whether or not they would like to do so. In that case it would be an exercise in futility for the Court now to direct the authorities to give consideration to Budget's requests.

To overcome this obstacle, the Applicant mounts a two-pronged attack on the validity of the contracts. One line of attack is in the area of public law. In that context it seems to me, the Applicant's standing to seek judicial review of the decisions of 1980 and 1982 must be in issue. The other is a claim that the licences are illegal because they were procured in contravention of the Commerce Act. It seems therefore that I am bound to look at the question of locus standi on both levels - because even if I conclude that the Applicant has no standing to seek judicial review of the decisions of 1980 and 1982, this is not necessarily enough to dispose of the Applicant's case.

I will deal first with the general question - i.e. whether Budget has standing to seek a review of the decisions not to consider its request for airport concessions, assuming at this point that the existing contracts present no obstacle to affording the relief applied for.

The first requirement must be that the Applicant show that there has been a breach of some duty to which the authorities are subject under public law - that some identifiable principle of public law will be violated if, without considering the Applicant's representations the authorities refuse to entertain its request for airport concessions. The second requirement is that the Applicant show that its interests are prejudicially affected in consequence of that breach of duty.

The question whether a public authority is bound to give consideration to a request for a licence or privilege in the absence of an express statutory requirement that it do so has been answered in a number of cases by reference to the three-fold categorisation adopted by Megarry V.C. in McInnes v. Onslaw Fane (1978) 3 All.E.R. 211, 218 - i.e. the "forteiture cases," "expectation cases" and "application cases" classification. For example this was the approach taken by Vautier, J. in Smittys Industries Ltd v. Attorney-General (1980) 1 N.Z.L.R. 355 and by the English Court of Appeal in Cinnamond v. British Airports Authority (1980) 2 All.E.R. 368. In most circumstances the McInnes distinctions afford a methodical approach to the problem: they recognise that a person who is threatened with having something taken away from him (the forfeiture cases) has a right to a hearing which complies with the requirements of natural justice while, generally, no comparable right can be asserted by a person who is a

mere applicant with no existing licence or privilege on which to found a legitimate expectation that his application will be granted.

The intermediate class - the "legitimate expectation case" - has generally been accorded the same sort of rights as those in the "forfeiture" class - bearing in mind that the rules of natural justice and "fairness" may not require the same observances in both cases. But Megarry, V.C. expressly stated that he did not advance his three-fold categorisation as an exhaustive classification, and it has not escaped criticism (see Wades "Administrative Law" p.496 footnote 10); at the risk of being accused of heresy, I am prepared to consider the possibility of there being circumstances in which a public authority, by virtue of the nature of its functions, is under an obligation to give consideration to an application by a person who seeks a licence or privilege even though he cannot lay claim to a "legitimate expectation" founded on some pre-existing practice or situation.

It can hardly be said that in asking for an airport concession Budget has a "legitimate expectation" in the framework of the McInnes classification. Nevertheless, in the absence of any obstacle to the exercise of the authority's discretion to grant or refuse, I would hold that Budget does have a right to have its request considered. I have arrived at that view on a

consideration of on the nature of the undertaking which the airport authorities are empowered to manage. An airport, especially an international airport, is not just a place where aircraft land and where passengers disembark. It is a large complex designed to cater for the immediate requirements of travellers, which include such matters as facilities for banking, the provision of meals, and affording convenient arrangements for obtaining transport by taxis, buses and rental cars. Not only is it an important function of airport authorities to see that these requirements are provided in adequate measure, but the authorities are given specific statutory powers for that very purpose. Being entrusted by the Legislature with what really amounts to monopolistic control over a large slice of the rental car business generated by the airport under its management there must, I think, be some corresponding duty on the part of an airport authority to act fairly and in an even handed way towards parties who seek the opportunity to share in the business of catering for airline passengers - subject of course to the requirements of efficient management and to any restrictions imposed by the availability of space.

In that situation I think a rental car operator who is able and willing to provide services to the public at an airport and who requests an opportunity to do so has a right to expect that, in the public interest and in fairness, his request will be considered on its merits.

There is, of course, no doubt that the Applicant is prejudiced by the refusal of the authorities to entertain its requests for airport concessions.

I would therefore hold that, unless it is made to appear that the airport authorities now have no discretion which they can exercise, the Applicant does have standing to apply for review of the decisions not to consider its applications for airport concessions.

The further question is whether the Applicant has standing to seek the intervention of the Court to declare the contractual arrangements entered into in 1980 and 1982 invalid by reason of the failure of the authorities to comply with their obligations under public law.

Mr Gault acknowledged in his closing submissions that in inviting the Court to declare that the decisions made by the airport authorities in 1980 and 1982 were in breach of duties imposed by public law, the Applicant is invoking the Court's jurisdiction under the Judicature Amendment Act, 1972. I think this must be so because in seeking orders that the authorities now hear and consider the applicant's request for concessions at the airports, untrammelled by any contractual obligations to Hertz and Avis, the Applicant must of necessity impugn the original decisions to grant exclusive licences to Hertz and Avis. If that is to be done on grounds of public law, then it

can be done only by applying for one or more of the forms of relief now available under the Judicature Amendment Act, 1972.

It was Mr Wylie's submission that, because it is an entity which did not exist when the decisions to grant the current licences were made, Budget can have no standing to seek a judicial review of those decisions.

Mr Gault submits that the circumstance that Budget was not incorporated until 1983 is irrelevant: that the question of locus standi is simply a question whether there has been failure on the part of airport authorities to observe a public duty in a matter in which the Applicant presently has a legitimate interest. That interest, the Applicant claims, springs from the fact that the earlier decisions stand in the way of the right which the Applicant would otherwise have, to seek a review of the decisions of the authorities not to entertain Budget's present application.

I do not think Budget's claim to locus standi (vis a vis the decisions of 1980 and 1982) should be rejected simply because Budget did not exist in 1980 or 1982.

The argument advanced by Mr Gault is that if the contractual arrangements made in 1980 and 1982 present an obstacle to Budget seeking relief in respect of decisions

not to entertain its application for licences, then the decisions of 1980 and 1982 are matters in which Budget has an interest sufficient to give it standing to ask the Court to review those earlier decisions on grounds of public law. This reasoning, while it demonstrates that Budget's interests are indeed prejudicially affected by the decisions made in 1980 and 1982, does not touch on the threshold question whether Budget, even though disadvantaged by the granting of licences exclusively to Hertz and Avis, has standing to seek a review of decisions which were, at the time when they were made, no more than administrative decisions made in the course of carrying out the management functions of the airport authorities.

As Lord Wilberforce observed in IRC v. National Federation of Self-employed And Small Businesses Ltd, in determining the issue of locus standi, "...It is necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties and to the breach of those said to have been committed."

Once it is accepted, in line with I.R.C. v. National Federation of Self Employed and Small Businesses Ltd that the question of standing involves a full consideration of both the law and the relevant facts it is not always feasible to discriminate beween matters directly relevant to the issue of locus standi and those which, on a strict

analysis, are relevant only to the substantive question of whether the Applicant has made out a case. I have dealt with locus standi as a separate issue because it was so raised by the parties, but I think there is much force in the observations at p.589 of Wade's "Administrative Law" that the test of locus standi as formulated in I.R.C. v. National Federation of Self Employed and Small Businesses Ltd appears to be a test of the merits of the application rather than a test of locus standi.

It is my view that the essentially commercial nature of the decisions made by the airport authorities in 1980 and 1982 precludes the Applicant from having locus standi to apply for review of those decisions. However, in case I am wrong in that conclusion, I will go on to consider the substantive question as to whether the Applicant has made out a case for relief assuming that it has the required locus standi.

I will deal first with the Applicant's submission that the contracts were in breach of the obligations of the airport authorities under public law.

The grounds advanced are:-

(1) That by purporting to bind themselves for a term of years not to grant more than two rental car concessions at each airport, the airport authorities infringed the

principle that a public authority is not competent to enter into contractual obligations which effectively disable the authority from the future exercise of discretionary powers.

(2) That in making their decisions to grant airport licences to Hertz and Avis and to exclude other rental car operators during the currency of those licences, the airport authorities failed to act reasonably, failed to act in the public interest, failed to take all relevant matters into account, took irrelevant matters into account and based their decisions on mistakes of fact.

As to the first ground - the submission that the authorities were not able to fetter themselves in the future exercise of their statutory powers - I do not think the principle is applicable to a commercial contract entered into by a public authority for a purpose which is incidental to and consonant with the primary purpose for which the public authority is constituted.

The function of airport authorities is to "establish, improve, maintain, operate or manage airports" (Airport Authorities Act, 1966). In particular, s.4(e) provides that in the exercise of its powers, any airport authority may from time to time:-

> "Operate or manage any airport as a commercial undertaking and for that purpose establish,

operate, or manage, or cause to be established, operated, or managed at airports refreshment rooms, bookstalls, booking offices, travel agencies, and such other facilities as may be considered necessary."

Section 6 of the Act contains specific powers of leasing as follows:-

"S.6(1) Any airport authority may grant a lease of all or any part of any land, buildings, or installations vested in the airport authority for any purpose that will not interfere with the safe and efficient operation of the airport.

(2) Leases under subsection (1) of this section may be granted by private contract or otherwise to any person for such consideration and on such terms and conditions as the airport authority may determine:

Provided that no lessee shall erect or make structural alterations to any building or other installation without first obtaining the approval in writing of the airport authority and in no case shall that authority give its approval if the erection or structural alteration of a building or installation will interfere with the use and enjoyment of the land as an airport.

(9) For the purposes of this section the term "lease" includes any form of tenancy and a licence to occupy or use any premises or appliance."

In A.B.C. Containerline v. N.Z. Wool Board (supra cit.) Davison, C.J. approved and applied the following dictum from the judgment of Pennycuick V.C. in Dowty Boulton Paul Ltd v. Wolverhampton Corporation (1971) 2 ALL.E.R. 277, 282: (1971) 1 W.L.R. 204, 210:-

> "The cases are concerned with attempts to fetter in advance the future exercise of statutory powers otherwise than by the valid exercise of a statutory power. The cases are not concerned with the position which arises after a statutory power has been validly exercised. Obviously, where a power is exercised in such a manner as to create a right extending over a term of years, the existence of that right pro tanto excludes the exercise of other statutory powers in respect of the same subject-matter, but there is no authority and I can see no principle on which that sort of exercise could be held to be invalid as a fetter on the future exercise of powers."

In my view, it was competent for the airport authorities to grant exclusive licences to Avis and Hertz for terms of years notwithstanding that by so doing, the authorities created in favour of the licensees rights which pro tem precluded the granting of similar licences to any other person.

The second ground on which the Applicant seeks (under public law) to impugn the decisions of 1980 and 1982 to grant licences exclusively to Hertz and Avis invokes all the criteria which were referred to in Associated Provincial Picture Houses Ltd v. Wednesbury Corporation (1948) 1 K.B. 223. It is questionable whether any of those are applicable to cases where a public authority charged with the duty of managing property enters into a commercial contract in the course of discharging its managerial function. The Applicant's contentions under this head call for an examination of the procedure followed by the airport authorities in calling for and dealing with tenders for airport licences in 1980 and 1982.

In both Christchurch and Auckland, on the expiry of the then existing concessions (which were held by Hertz and Avis), the respective airport authorities took the course of inviting tenders from rental car operators interested in securing licences to operate from the Christchurch and Auckland International Airports. Tenders in respect of the Christchurch International Airport were invited by the C.C.C. in or about March 1980: the A.R.A. called for tenders in respect of the Auckland International Airport in November 1981.

It seems to be a fact that at the relevant times (i.e. in 1980 and in 1981), there were only three rental car operators seriously in contention for concessions at the Christchurch and Auckland International Airports. These were Avis and Hertz (who held the then existing licences) and a third company by the name of Dominion Budget Rent-a-Car limited.

(The last named company is not to be confused with the present Applicant, Dominion Budget Rent-a-Car (1984) Limited. The Applicant company did not exist when the current licences were granted to Hertz and Avis: it was incorporated on 27 September 1983 and was formed to purchase the assets of Dominion Budget Rent-a-Car Limited, then in receivership. The present shareholders of the Applicant company are two Wellington based companies - General Finance Limited and Equitable Development

Corporation Limited. The New Zealand Budget operations are now managed by an Australian company, Budget Rent-a-Car System Pty. Ltd. Approval of the Overseas Investment Commission has been given to an existing agreement for the Australian company to acquire by purchase all the shares in the Applicant company. So that, on settlement of the purchase, Budget will become a wholly owned subsidiary of the Australian company).

For convenience, I will refer to the now defunct company, Dominion Budget Rent-a-Car Limited as "Dominion".

When, in 1980, the C.C.C. called for tenders in respect of the Christchurch International Airport, consideration was given to the possibility that airport concessions might be allocated to all three companies - Hertz, Avis and Dominion. It was appreciated by the authority that a tenderer would be likely to offer to pay more for a licence if the number of licences was restricted to two. So tenders were invited on two alternative bases - on the basis that the number of licences would be restricted to two and, alternatively, on the basis that there would be three licences granted. Tenderers were required to offer a percentage of gross receipts with a guaranteed minimum annual payment. They were required, also, to provide information as to their turnover, both present and anticipated.

Although, at first sight, this seems an eminently fair and reasonable way for the authority to approach the matter, in fact it presented Hertz and Avis with a means of ensuring that it was most unlikely that the third contender, Dominion, would obtain a licence.

It has to be appreciated that the airport authority, charged as it is with the responsibility of operating the airport as a commercial undertaking, regarded the rental car concessions as a substantial source of revenue. I have no doubt that the authority was conscious, also, of the fact that, in the public interest, it was desirable to have at least an adequate number of rental car companies licensed to operate from booths in the airport; but, subject to this requirement, the authority saw as the prime consideration its need to obtain the best possible revenue from the rental car concessions. In my view the airport authority is not open to criticism on this account.

Although it must be a matter of inference, I cannot escape the conclusion that when tenders were invited on the alternative bases of either three licences or two licences being granted, it was immediately apparent to Hertz and Avis that, as each of them was in a much larger way of business than Dominion they could readily ensure that the "three licence" option would have no appeal to the mercenary instincts of the airport authority.

To achieve this position, Hertz and Avis had only to submit their tenders on the "three licence" basis at figures so low, in comparison with their "two licence" tenders, that the authority would inevitably choose the two licence option. And this is exactly what happened. I will not quote the actual amounts of the tenders, because it was agreed by all parties that the figures disclosed to the Court should be treated as confidential. It suffices to say that on the "two licence" basis, both Avis and Hertz offered to pay the same percentage of their gross receipts. They were equal also in their offer on the "three licence" basis. But the percentage of gross receipts they offered on the "three licence" basis was only a fraction of what they offered on the "two licence" option. By the same token, the guaranteed minimum payments offered by Hertz and Avis on the "three licence" option were, in both cases, less than one-fifth of the minimum payments offered on the "two licence" basis. These differences are of such magnitude that it would be absurd to suggest that they were relative to the diminution of business which could be anticipated by Hertz and Avis in consequence of the unwelcome intrusion into the airport of a third licensee. The Avis and Hertz tenders were plainly designed to render the "three licence" alternative a comparatively uneconomic proposition for the airport authority. The result, readily foreseeable, was that the airport authority accepted the "two licence" tenders of Hertz and Avis -

and, ipso facto, Dominion was excluded from the Christchurch International Airport during the currency of the Hertz and Avis licences. (At this stage, I am assuming it to be a fact that the contractual arrangement was that no further licences would be granted during the currency of the Hertz and Avis licences).

The procedure in Auckland was virtually the same as in Christchurch except that, after the tenders came in, the A.R.A. did make an unsuccessful effort to persuade Hertz and Avis to increase their "three licence" bids. Tenders were invited in 1981 on the two alternative bases and, again, Hertz and Avis submitted tenders which obviously bore no relationship to the anticipated difference in gross returns from a "two licence" as compared with a "three licence operation and which effectively ruled out the possibility of Dominion securing an airport concession - unless the A.R.A. was prepared to sacrifice a substantial amount of its revenue from rental car concessions in order to accommodate a third licensee.

The course of events after the tenders were received is recorded in documents produced by the A.R.A.

On 22 January 1982, Mr H.K. Aimer, the General Manager of the A.R.A. reported to the A.R.A's Airport Committee on the result of the tender invitation. The report reads (in part):-

> "The simple solution is to maintain the status quo and renew the licenses of Mutual and Tasman. This is clearly what they are hoping for.
>
> But Dominion have produced data which indicates that they have secured a very substantial share of the total available business, and in the interests of the public and of airport revenue we would prefer to have all three operators licenced.
>
> It is therefore suggested that the General Manager be authorised to enter into negotiations with the three applicants. It is envisaged that the outcome may well be rejection by the Committee of all tenders, and instead a formal offer by the Airport Authority to the applicants giving them the opportunity to accept or reject our terms. However, it would be premature for the Committee to resolve in this way at present."

Mr Aimer's recommendation was adopted by the Airport Committee at a meeting held on 29 January 1982.

On 19 February 1982, Mr McDonald, the Manager of the Auckland International Airport, reported to the Airport Committee that he had separately interviewed all three tenderers but that "after a second round of negotiations the highest indicator obtained from an existing licensee for a "1 of 3" situation ... still did not compute in the Authority's interest". Mr McDonald's report proceeded to summarise the forecast returns from the acceptance of various combinations of tenders, concluding that the highest return would be achieved by accepting the Hertz and Avis "1 of 2" tenders and the lowest return by accepting the Hertz, Avis and Dominion tenders on a "1 of 3" basis. Mr McDonald's recommendation to the Airport Committee was:-

"It is recommended that the tender of Tasman Rental Cars Limited dated 30 November 1981 and the tender of Mutual Rental Cars Limited dated 30 November 1981 be accepted on the basis of their bids for one of two rental car licences at Auckland International Airport."

The report included the comments that "revised calculations of market share throws some doubt on the market share reported by Dominion Budget and hence Dominion's ability to step in should either Hertz or Mutual-Avis fail to take up a formal offer by the Authority" and "The market share would have to become more evenly distributed before the Authority could expect to benefit from a "1 of 3" situation. Such a position could be more appropriate next time bids are sought"

At a meeting on 1 March 1982, at which Mr McDonald was present, the Airport Committee adopted Mr McDonald's recommendation: the minutes of that meeting record the following:-

"Rental Car Concessions

Following the calling of tenders, Airport staff made a very thorough examination of the provision of rental car concessions to operate at Auckland International Airport. Although it had been hoped that it may have been possible to have had three concessions operating, the investigations indicated that the best interests of the Authority, the public, and the concessions would be served by restricting the contracts to two operators. As a result of consideration of Officers reports, the Airport Committee resolved to let the concession to Tasman Rental Cars Ltd (Hertz) and Mutual Rental Cars Ltd (Avis)."

On 30 March 1982, Mr McDonald, as Manager of the Auckland International Airport, wrote to both Avis and Hertz as follows:-

> I have pleasure in confirming our verbal advice on 1 March 1982 that the Airport Committee, at its meeting on 1 March 1982 resolved that your tender dated 30 November, 1981 be accepted on the basis of your bid for one of two rental car licences. Please treat this letter as formal acceptance of that tender.
>
> The contract document will be delivered to you for formal execution very soon.
>
> Authority officers will contact you separately to arrange a further lease of the servicing site at the Airport.
>
> Thank you for your tender.
>
> Yours faithfully,
>
> (signed W.R. McDonald)
>
> W.R. McDonald
> MANAGER
> AUCKLAND INTERNATIONAL AIRPORT."

Mr Gault, for the Applicant, concedes that the authorities were entitled to regard maximising income as a legitimate and, indeed, prime objective. However, Mr Gault submits that in both Christchurch and Auckland, the procedure adopted by the authorities, although ostensibly intended to achieve the purpose of maximising the income from the rental car concessions, was in fact ill designed for that purpose - that, wittingly or unwittingly, both authorities adopted a tendering system which afforded no realistic opportunity for a third prospective licensee to tender

successfully because it enabled the then existing licensees to manipulate the system in such a way that they could be assured of the exclusion of the only other contender. Moreover, as Mr Gault points out, there was no incentive whatever for any of the three operators to make a competitive bid on the "three licence" basis because, if the "three licence" system were to be adopted, and there being only three contenders, all were bound to succeed no matter how low they tendered.

Accordingly, Mr Gault submits, the decisions of the authorities to grant only two licences were arrived at by a tendering process which was unfair in that it arbitrarily excluded any operator other than the holders of the existing licences and which was against public interest in that it did not involve a fair competitive element.

Furthermore, Mr Gault submits, in the case of the Auckland licences, the A.R.A. made its decision on the basis of a mistake of fact. The alleged mistake is that the A.R.A. was led by Mr McDonald's report of 19 February 1983 to believe that Mr McDonald had fully explored the possibility of obtaining better terms from all three tenderers on a "three licence" basis whereas that was not, in fact, the case. It is a fact that Mr McDonald did not go so far as to confront Hertz and Avis with an ultimatum that, unless they improved their bids for licences under

the "three licence" option, the authority would reject all tenders and state its own terms on a "take it or leave it" basis.

Mr Timings, Auckland Area Manager for Hertz, deposes that Mr McDonald and Mr Haughey of the A.R.A. informed representatives of Hertz that the A.R.A. had a preference for three concessions and was considering rejecting all tenders and negotiating with individual tenderers: the Hertz representatives were asked whether, in that event, Hertz would consider increasing the percentage of turnover offered on the "three licence" basis. Mr McDonald was given an indication that Hertz would probably consider an increased percentage but with a commensurate reduction in the guaranteed minimum. As regards Avis, that company's attitude to the post tender negotiations was uncompromising. A letter dated 16 February 1982 from Avis to Mr McDonald indicates that Avis was not prepared to discuss any departure from its original tender.

It may well be the case, as Mr Gault suggests, that had the A.R.A. delivered an ultimatum to Hertz and Avis in 1982, those two companies would have agreed to realistic terms on the "three licence" basis and thus the A.R.A. could have achieved a "three licence" structure which would have returned a better revenue than was attained by accepting the Hertz and Avis "two licence" tenders.

The decision to be made by the authorities was essentially, but not entirely, based on financial considerations. As Mr McDonald pointed out, there were other factors to be considered. I do not think it should readily be inferred that the authority was misled by Mr McDonald's report. The written report was obviously no more than a brief summary of the outcome of the post-tender negotiations and was, no doubt, fully discussed with Mr McDonald when it came before the Committee.

In submitting that the A.R.A. decision should be held invalid as being founded on a mistake of fact, Mr Gault relied particularly on the judgment of Cooke, J. in Daganayasi v. Minister of Immigration (1980) 2 N.Z.L.R. 130, 145 to 152. That was a very different case. The Court was not concerned with the validity of a commercial contract, but with the refusal of a Minister of the Crown to exercise his discretionary power to rescind a deportation order.

I have held, in accordance with the principles applied in Webster v. Auckland Harbour Board, that the decisions of 1980 and 1982 to grant licences exclusively to Hertz and Avis were made in the exercise of statutory powers and so are reviewable, even if only on a limited number of grounds. There are few grounds on which commercial contracts such as those now in question will be held to

be ultra vires. In Webster v. Auckland Harbour Board the joint judgment of Cooke and Jefferies, JJ., concluded as follows:-

> "The acts of a public body in managing public property are never lightly interfered with by the Courts. Nothing in this judgment is intended to suggest some new willingness to intrude into matters of local body administration."

To the same effect, McMullin, J. said, at p.653:-

> "And it is to be borne in mind that the exercise of such powers by local authorities is more often than not no more than an exercise in management and administration. In the result the decision of a local authority in such circumstances will not be impeached by the Courts merely beecause it may seem unfair to the private citizen affected. A more objective approach than that is necessary."

Although the tendering procedures adopted by the two authorities may not have been calculated to result in the best possible terms for the authorities, the worst that can be said of the eventual decisions is that if the authorities had set about matters differently they might have obtained for themselves better terms than they did and, at the same time, afforded a licence to a third candidate. If so, that is not, in my view, a ground for holding the decisions ultra vires and the licences invalid. I am not persuaded that the A.R.A. was in fact labouring under any misapprehension as to the extent of Mr McDonald's post-tender negotiations. But if, contrary to

my impression, the A.R.A. was under any such misapprehension, that circumstance could not, in my view, render the consequent decision ultra vires the authority.

In this regard, I find myself in complete agreement with Mr Atkinson when he submits that the decision of a public authority to enter into a commercial contract which is compatible with the exercise of a management function vested in the public authority is not ultra vires the authority simply because it appears, in retrospect, that the authority could have obtained better terms than it did or that the authority entered into the contract under some factual misapprehension induced by a member of its own staff. Lord Roskill said in I.R.C. v. National Federation of Self-Employed and Small Businesses Ltd (supra - at p.662 of the Report):-

> "The Court has a general discretion which, if any, relief shall be granted and many of the old decisions restricting the circumstances in which declarations may be granted to establish legal rights seem to me to be no longer in point. On the other hand, it is equally important that the courts do not by use or misuse of the weapon of judicial review cross that clear boundary between what is administration, whether it be good or bad administration, and what is an unlawful performance of the statutory duty by a body charged with the performance of that duty."

There is a vast difference - and a clear distinction - between what is unlawful and what is bad business administration. If the law were otherwise then parties

who, in good faith, commit themselves to commercial contracts with public authorities would indeed be in a perilous situation.

Perhaps the Applicant's strictures on the procedures adopted in calling for and in dealing with the tenders for the licences currently held by Hertz and Avis are warranted in terms of commercial efficacy - that is not for me to determine. But there is nothing in any of those strictures which would afford a basis for holding that the contracts were entered into unlawfully.

The third ground of the Applicant's attack on the validity of the current contractual arrangements is not founded in public law but on s.48(1) of the Commerce Act, 1975. The allegation is that when Hertz and Avis tendered for airport licences, they acted in collusion with the object of effectively excluding a third contender from consideration. I believe they did this, and that this is the only rational explanation of the fact that the Hertz and Avis tenders on the "three licence" basis were identical as to percentage of revenue and were pitched so low as to render that option wholly unacceptable to the airport authorities.

With the knowledge that there were only three companies in serious contention, Hertz and Avis must have realised that if three licences were to be granted there was no point in

tendering competitively. While this, on its own, might afford an explanation of the low tenders submitted by Hertz and Avis on the "three licence" option, the fact that both Hertz and Avis tendered the same percentage of gross revenue persuades me that they were in collusion and that their primary objective was to exclude Dominion from serious consideration. I think this is confirmed by the evidence of Mr Coxhead, Chairman and chief executive of the Avis group of companies. Mr Coxhead said in cross-examination that there was communication between his company and Hertz on the subject of the tenders before they were lodged and that both companies were aware that there was a likelihood of there being a third operator in contention for a place. Asked what he would say to the fact that the figures tendered in Auckland and Christchurch suggested there had been some co-operation between Avis and Hertz, Mr Coxhead replied:-

> "Well, I'd say yes. There could have been some co-operation. It would be of a general nature."

When that evidence is related to the actual tenders, it seems to me that only one conclusion is possible. Was that illegal?

Section 48(1) of the Commerce Act, 1975 reads:-

> "It shall be an offence against this Act for any two or more persons, being either wholesalers, retailers, or contractors, or suppliers of

> services, to tender for the supply or purchase of any goods or services at prices, or on terms, agreed, or arranged between them; and it shall be an offence against this Act for two or more of any such persons to agree or arrange for all or any of them to abstain from tendering for the supply or purchase of any goods or services, tenders for the supply or purchase of which have been invited."

The Act (s.2) defines "goods" and "services" as follows:-

> ""Goods" includes -
>
> (a) ships, aircraft, and other vehicles; and
> (b) Animals, including fish; and
> (c) Minerals, trees, and crops, whether on, under or attached to land or not; and
> (d) Gas and electricity:"

> ""Performance of services" or "services" includes, but without limiting the generality of that expression, the doing of any thing pursuant to a contract or agreement with any person (not being a contract or agreement of service between master and servant) which confers any right or benefit on that person or any other person:"

The prohibition is in relation to tenders "for the supply or purchase of any goods or services".

The tenders submitted by Hertz and Avis were for the acquisition of licences to operate their respective businesses from the airports. The acquisition of such licences could not be regarded as the purchase of either goods or services.

Nor, in my view, were Hertz and Avis tendering to supply services - their tenders were for the privilege of operating their businesses from the airport premises - not for the supply of services to the airport authorities.

I am bound to hold that even though the tenders submitted by Hertz and Avis may have been on terms arranged between them with the prime object of effectively excluding from consideration the tender of any third candidate for an airport concession, there is nothing in the Commerce Act, 1975 to render that procedure illegal.

I conclude therefore that no basis can be found either in public law or in the Commerce Act for the Court to hold invalid the decisions of the airport authorities made in 1980 and 1982 to enter into contracts which provided, inter alia, that while the existing airport licences and any renewals granted pursuant to those licences remain in force, no similar concession will be granted to any other rental car operator.

It remains to consider whether the contracts between the two airport authorities and the present licensees do in fact so provide. The formal Deeds, executed in 1981 and 1982, contain no such provision. The Respondents contend that this is far from conclusive. That the course of dealings between the parties during the period leading up to the acceptance of the Hertz and Avis tenders was such

that either it was an implied term or condition in the licences that only two concessions would be granted or that the conditions on which the tenders were invited, offered, and accepted constituted contracts which, as regards the exclusive quality of the licences, survives without merging in the subsequent Deeds or, alternatively, that those negotiations gave rise to a collateral contract.

It is quite clear that in both Auckland and Christchurch tenders were invited on two alternative bases - either to operate as one of two licensees or as one of three licensees. In each case the tenders which were accepted were submitted expressly as tenders to operate as one of two licences, and as such they were accepted.

I do not think this is a case where a term or condition such as that which the Respondents seek to assert can be implied in the formal deeds. It is axiomatic that the construction of a document is not to be controlled by previous negotiations; (Prenn v. Simmonds (1971) 3 All.E.R. 237).

Mr Wylie submitted that in truth the real contracts were constituted by the acceptance of the tenders on a "two licence" basis: that the doctrine of merger does not alter that situation, because it was not the intention of the parties that the formal deeds should entirely supplant

the original contracts. If the deeds were intended to express only part of the contract then, it can be argued, the part not so expressed survives. There is authority for this proposition in cases such as Lawrence v. Cassel (1930) 2 K.B. 83 and Hissett v. Reading Roofing Co. Ltd (1970) 1 All.E.R. 122. There is force in Mr Wylie's argument that it was never intended by the parties that the formal deeds would express the whole of the contracts.

However I think Mr Wylie is on stronger ground when he submits, alternatively, that this is a case where the grant of the licences was induced and accompanied by a collateral undertaking that during its currency each licence was to be one of only two licences at each airport. The classic statement is that of Lord Moulton in Heilbut Symons & Co. v. Buckleton (1913) A.C. 30, 47.

> "It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundrred pounds", is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possession to the full the character and status of a contract. But such collateral contracts must from their very nature be rate. The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by 100l., and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal

> contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shown."

Lord Moulton went on to add, as a note of caution, that such contracts are viewed with suspicion and, as Mahon, J. observed in Donovan v. Northlea Farms Ltd (1976) 1 N.Z.L.R. 180, 184, where a collateral contract is alleged, the relevant evidence must be subjected to an exact scrutiny. In the present case the evidence is clear. It is contained in the forms of invitation to tender and in the tender documents, from which it plainly emerges that one of the considerations which induced the present licensees to enter into the Deeds of licence, on the terms in which they did, was that the airport authorities agreed that each licence was to be "one of two". There is certainly no inconsistency between the existence of that undertaking and the terms of the licences as set out in the formal deeds. The clauses which confer rights of renewal on the licensees provide in both cases that, except that there is to be only one renewal, the renewed licences will be on the same terms as the existing licences. It must follow that it was intended that the collateral undertaking would enure while the renewed terms are in force. In that regard I must reject Mr Gault's submission that the collateral undertaking will be spent when the terms of existing licences run out.

Accordingly, I hold that there are now in force valid and binding contracts by which the airport authorities are bound to grant licences for renewed terms to Hertz and Avis and that there are also in force valid and binding contractual undertakings which preclude the authorities from granting concessions to Budget at either the Christchurch or Auckland International Airports during the currency of those renewed terms. That being so, in refusing at present to entertain the request of Budget for similar concessions, the authorities are not exercising a discretionary power of decision. In the final analysis I agree with Mr Wylie that it is idle to suggest that the authorities have a duty to receive and consider submissions from Budget when they are powerless by virtue of existing validly made contracts to give effect to those submissions.

The application is dismissed and the interim order is, accordingly, discharged.

The question of costs is reserved.

Solicitors:-

Messrs Webster Malcolm & Kilpatrick, Aucland,
Solicitors for Applicant;
Mr J.I. Field, Solicitor for A.R.A. First Respondent;
Messrs Weston Ward & Lascelles, Christchurch,
Solicitors for Second Respondent;
Messrs Bradley Steven & List, Timaru, Solicitors for
Third and Fourth Respondents;
Messrs Lane Neave Ronaldson, Christchurch, Solicit
for Fifth Respondent.